

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LYNOR NOEL o/b/o J.A.W.,
Plaintiff,
v.
CAROLYN W. COLVIN,
Commissioner of Social Security,
Defendant.

No. CV 12-2064-AGR

MEMORANDUM OPINION AND ORDER

Lynor Noel (“Noel”) filed this action on November 30, 2012, on behalf of her son J.A.W.¹ Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 9, 10.) The parties filed a Joint Stipulation (“JS”) that addressed the disputed issue. The Court has taken the matter under submission without oral argument. The decision of the Commissioner is reversed and this matter is remanded for further proceedings consistent with a finding that J.A.W. has extreme limitation in the functional domain of acquiring and using information.

²⁷ The Court granted Noel's application to be appointed guardian ad litem for J.A.W.
²⁸ (Dkt. No. 7.)

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PROCEDURAL BACKGROUND

On November 30, 2009, an application for supplemental security income benefits was filed on behalf of J.A.W. Administrative Record ("AR") 17, 97-104. The application was denied on April 12, 2010. AR 53. On March 30, 2011, the Administrative Law Judge ("ALJ") conducted a hearing at which Noel and J.A.W. testified. AR 38-52. On April 20, 2011, the ALJ issued a decision denying benefits. A.R. 14-29. On August 24, 2012, the Appeals Council denied J.A.W.'s request for review. A.R. 5-9. This lawsuit followed.

11.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court has authority to review the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

“Substantial evidence” means “more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner’s decision, the court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the court must defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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DISCUSSION

A. Definition of Disability for a Child

“An individual under the age of 18 shall be considered disabled . . . if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i).² An impairment is “marked and severe” if it meets, medically equals, or functionally equals an impairment listed in 20 C.F.R. § 404, Subpart P, Appendix I. 20 C.F.R. § 416.924(d)(1). A claimant’s condition “meets” a listed impairment if the claimant’s impairment matches the listed impairment. *Id.* A claimant’s condition “medically equals” the listed impairment by demonstrating medical findings that are of equal medical significance to the listed impairment. 20 C.F.R. § 416.926(b)(1)(ii). A claimant’s condition “functionally equals” a listed impairment by showing either a marked limitation in two functional domains (out of six) or an extreme limitation in one domain. 20 C.F.R. § 416.926a(a). The six domains are acquiring and using information, attending and completing tasks, interacting and relating with others, moving about and manipulating objects, caring for yourself, and health and physical well-being. 20 C.F.R. § 416.926a(b)(1)(i-vi).

B. The ALJ's Findings

J.A.W. has the severe impairments of learning disorder, speech and language delay and borderline intellectual functioning disorder. AR 20. The ALJ found that J.A.W. does not meet or equal a listing. *Id.* With respect to the six domains, J.A.W. has marked limitation in acquiring and using information, less than marked limitation in attending and completing tasks, and no limitation in interacting and relating with others,

² “[N]o individual under the age of 18 who engages in substantial gainful activity . . . may be considered to be disabled.” 42 U.S.C. § 1382c(a)(3)(C)(ii).

1 moving about and manipulating objects, caring for himself, and health and physical well-
 2 being. AR 22-29. The ALJ found that J.A.W. has not been disabled since November
 3 13, 2009, the date the application was filed. AR 29.

4 **C. Acquiring and Using Information**

5 Noel argues that the ALJ erred in finding J.A.W. had "marked" rather than
 6 "extreme" limitation in the functional domain of acquiring and using information. AR 23.
 7 Specifically, Noel contends that a valid test score three standard deviations below the
 8 mean on the Clinical Evaluation of Language Fundamentals-Revised (CELF) mandates
 9 a finding of disabled. Noel cites J.A.W.'s April 2010 CELF results.

10 Limitations affecting a child's ability to acquire and use information are comprised
 11 of limitations to the acquisition of knowledge and limitations to the use of that
 12 knowledge. 20 C.F.R. § 416.926a(g)(1)(i)-(ii); Social Security Ruling ("SSR") 09-3p.³ A
 13 typically functioning school-age child is expected to (1) learn to read, write and do
 14 simple arithmetic; (2) become interested in new subjects and activities; (3) demonstrate
 15 learning by producing oral and written projects, solving arithmetic problems, taking
 16 tests, doing group work, and entering into class discussions; (4) apply learning in daily
 17 activities; and (5) use increasingly complex language. SSR 09-3p.

18 A marked limitation in a domain "interferes seriously with your ability to
 19 independently initiate, sustain, or complete activities. Your day-to-day functioning may
 20 be seriously limited when your impairment(s) limits only one activity or when the
 21 interactive and cumulative effects of your impairment(s) limits several activities." See 20
 22 C.F.R. § 416.926a(e)(2) (i). A marked limitation is more than moderate but less than
 23 extreme. *Id.* A child eighteen years or younger has marked limitation if he has a valid
 24 score that is two standard deviations or more below the mean "on a comprehensive

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 26 ³ Social Security rulings do not have the force of law. Nevertheless, they "constitute
 27 Social Security Administration interpretations of the statute it administers and of its own
 regulations," and are given deference "unless they are plainly erroneous or inconsistent
 28 with the Act or regulations." *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 standardized test designed to measure ability of functioning" in a domain and the child's
 2 "day-to-day functioning in the domain related activities is consistent with that score."
 3 See 20 C.F.R. § 416.926(a)(e) (2)(ii).

4 An extreme limitation in a domain "interferes very seriously with your ability to
 5 independently initiate, sustain, or complete activities. Your day-to-day functioning may
 6 be very seriously limited when your impairment(s) limits only one activity or when the
 7 interactive and cumulative effects of your impairment(s) limits several activities." See
 8 20 C.F.R. § 416.926a(e)(3)(i). An extreme limitation is more than a marked limitation,
 9 and it is the rating given to the worst limitations. *Id.* A child eighteen years or younger
 10 has an extreme limitation if he has a valid score that is three standard deviations or
 11 more below the mean "on a comprehensive standardized test designed to measure
 12 ability of functioning" in a domain and the child's "day-to-day functioning in the domain
 13 related activities is consistent with that score." See 20 C.F.R. § 416.926(a)(e)(3)(ii).

14 In April 2010, a speech/language pathologist administered a standardized test
 15 known as CELF⁴ and found that the test results were valid. AR 213, 214-17. J.A.W.'s
 16 language scores were three standard deviations below the mean and indicative of
 17 "extreme delay" in those areas. J.A.W. had "extreme" receptive (oral directions, word
 18 classes and semantic relationships) and expressive (formulated sentences, recalling
 19 sentences and sentence assembly) language delays. AR 214. J.A.W.'s total language
 20 score of 55 was the age equivalent of 5 years, 6 months and indicative of extreme
 21 delays. AR 215. The speech/language pathologist stated:

22 Significant deficits in the areas of receptive/expressive vocabulary, grammar,
 23 syntax and auditory processing were noted. [J.A.W.] required the maximum
 24 allowable repetition of test instruction and items. He missed most items that

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26 ⁴ The CELF is a "standardized test which provides differentiated measures of
 27 selected language skills in the areas of word meanings (semantics), word and sentence
 28 structure (morphology and syntax), and recall and retrieval (memory) for children 6
 years 0 months through 21 years 11 months." AR 215.

1 did not permit repetition, per test protocol. There was an extremely slow
2 response time. [J.A.W.] demonstrated an inability to recognize errors.
3 [J.A.W.] had several "No Response" errors. He could not tell his home
4 address, mother's phone number of his date of birth. [J.A.W.] struggled to
5 maintain any conversation for more than 1-2 turns. He demonstrated a limited
6 verbal repertoire.

7 AR 213.

8 Given the vital importance of language abilities to the domain of acquiring and
9 using information, the CELF is properly considered a "comprehensive standardized test
10 designed to measure ability or functioning" in the domain. See *F.M. v. Astrue*, 2009 WL
11 2242134, *8 (E.D.N.Y. July 27, 2009) (quoting 20 C.F.R. § 416.926a(e)(2)(iii)); see also
12 *Perez v. Astrue*, No. 08-CV-02176, 2009 WL 3076259, at *6 (D. Colo. Sept. 23, 2009)
13 ("Given the important role of oral communication in the domains of acquiring and using
14 information and interacting and relating with others, a child with a significant speech
15 impairment may have functional limitations in both domains.").

16 The ALJ noted that a speech/language pathologist conducted an evaluation in
17 April 2010, but inexplicably failed to consider the CELF scores and, specifically, the fact
18 that J.A.W.'s valid scores were three standard deviations below the mean pursuant to
19 20 C.F.R. § 416.926(a)(e)(3)(ii). This was error. See *Reddick v. Chater*, 157 F.3d 715,
20 722-23 (9th Cir.1998) (ALJ erred in failing to account for significant evidence and
21 inaccurately paraphrasing portions of the record).

22 J.A.W.'s day-to-day functioning in acquiring and using information is consistent
23 with his poor score on the CELF, which would direct a finding of an extreme limitation in
24 that domain. See 20 C.F.R. § 416.926(a)(e)(3)(ii).

25 On October 6, 2009 and December 17, 2009, J.A.W.'s third grade teacher
26 completed a functionality questionnaire. AR 23, 233-37, 238-45. On both occasions,
27 the teacher rated J.A.W. a 5 on a scale of 1 to 5, indicating J.A.W. had a "very serious
28 problem (extreme)" in the domain of acquiring and using information. AR 23, 234, 239.

1 As noted by the ALJ, acquiring and using information included "comprehending oral
2 instructions; understanding school and content vocabulary; reading and comprehending
3 written material; comprehending and doing math problems; understanding and
4 participating in class discussions; providing organized oral explanations and adequate
5 descriptions; expressing ideas in written form; learning new material; recalling and
6 applying previously learned material; applying problem solving skills in class discussion;
7 using language appropriate to the situation and listener; and introducing and
8 maintaining relevant and appropriate topics of conversation." AR 23, 239. The teacher
9 reported that J.A.W. is "unable to work independently at grade level" and is working in a
10 "[Resource Specialist Program ("RSP")] 120 minutes per week in a very structured
11 environment." AR 234.

12 In an October 2009 re-evaluation of J.A.W.'s Individualized Educational Plan
13 ("IEP"), the psychologist noted that J.A.W.'s "scores revealed that he had difficulty
14 focusing his attention on instructions; his functioning was within the very low range in all
15 academic subjects; and his ability to apply his academic skills was within the low
16 range." AR 23, 194. "[H]is level of communication was limited and he did not speak
17 much." AR 23, 192-93. J.A.W. had "low achievement in areas of written expression,
18 basic reading skills, reading comprehension, math reasoning, math calculation, and oral
19 expression." AR 23, 191-92, 194. J.A.W.'s "expressive and receptive language skills"
20 were found to be in the bottom 1% and 8%. AR 193. On October 12, 2009, J.A.W.'s
21 school RSP teacher noted that J.A.W.'s performance is "low in mathematics and math
22 calculation skills; and very low in reading, written language, and written expression."
23 AR 203-04.

24 The ALJ noted that a state agency psychiatrist, Dr. Brooks, opined that J.A.W.
25 had a marked limitation in acquiring and using information. AR 24, 228. However, Dr.
26 Brooks is a nonexamining psychiatrist who relied on the speech/language pathologist's
27 scores. AR 228. The regulations provide that valid scores three standard deviations
28 below the mean fall within the range of extreme limitation. Dr. Brooks' conclusory form

1 does not explain his deviation from the regulations and does not constitute substantial
2 evidence to discount an examining pathologist's opinion.

3 The ALJ's decision is not supported by substantial evidence.⁵

4 **IV.**

5 **ORDER**

6 IT IS HEREBY ORDERED that the decision of the Commissioner is reversed
7 and this matter is remanded for further proceedings consistent with a finding that J.A.W.
8 has extreme limitation in the functional domain of acquiring and using information.

9 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the
10 Judgment herein on all parties or their counsel.

11 DATED: December 20, 2013



13 ALICIA G. ROSENBERG
14 United States Magistrate Judge

25 ⁵ The Commissioner now offers her interpretation of J.A.W.'s earlier scores on other
26 evaluations and whether those scores were one, two or three standard deviations below
27 the mean. The evaluation reports themselves do not identify the standard deviations.
28 More importantly, the ALJ did not rely on such an analysis and this court cannot
consider them. See *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) ("[w]e review only
the reasons provided by the ALJ in the disability determination").